

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TRACK DATA CORPORATION,	§	
Plaintiff,	§	
v.	§	
MITCHELL J. KOBERNICK	§	Civil Action No. _____
AND ALLAN KLEIN,	§	
Defendants.	§	
	§	

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff Track Data Corporation sets out its complaints against defendants Mitchell J. Kobernick and Allan Klein.

The parties, jurisdiction and venue

1. Plaintiff Track Data Corporation is a Delaware corporation, represented by the undersigned counsel.

2. Defendant Mitchell J. Kobernick, a resident of Harris County, Texas, may be served with process at 11451 Katy Freeway, Ste. 501, Houston, Texas 77079, or wherever else he may be found.

3. Defendant Allan Klein, a resident of Harris County, Texas, may be served with process at 11451 Katy Freeway, Ste. 501, Houston, Texas 77079, or wherever else he may be found.

4. This Court has original jurisdiction under 28 U.S.C. § 1332 because this is a civil action between citizens of different states in which the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

5. Because a substantial part of the events and omissions giving rise to plaintiff's claims occurred in Harris County, Texas, venue is proper in the Southern District of Texas under 28 U.S.C. § 1391(a)(2).

Background of this dispute

6. In 2010, plaintiff Track Data Corporation loaned a total of \$1,995,000 to four entities: (1) Comunidad Harbortree, L.L.C.; (2) Comunidad Capital Estates, L.L.C.; (3) Harbortree Apartments, Ltd.; and (4) Amherst Partners, Ltd.

7. Track Data's loans were evidenced by three promissory notes. Amherst Partners, Ltd. was the maker of two of the promissory notes – the "Senior Note" for \$598,467 (which was, ultimately, reduced to \$420,000) and "Note No. 2" for \$1,150,000, and Harbortree Apartments, Ltd. was the maker of "Note No. 3" for \$425,000. True and correct copies of the promissory notes are attached as exhibits 1 – 3, respectively.

8. Defendants Mitchell J. Kobernick and Allan Klein personally guaranteed prompt payment of all principal owed in connection with the Senior Note, Note No. 2, and Note No. 3. True and correct copies of the guarantees are attached as exhibits 4, 5.

9. Kobernick and Klein's guarantees are "an irrevocable, absolute, complete, and continuing guaranty of payment and collection ..." (Exhibit 4, ¶ 2; Exhibit 5, ¶ 2), under which their liability is joint and several. Exhibit 4, ¶ 3; Exhibit 5, ¶ 3.

10. Furthermore, in addition to being jointly and severally responsible for the payment and collection of the principal due under Senior Note, Note No. 2, and Note No. 3, Kobernick and Klein agreed to pay "all court costs and Lender's reasonable

attorneys' fees, together with the amount of any and all expenses, including fees and disbursements of Lender's attorneys and of any experts or agents retained by Lender or Lender's attorneys ..." Exhibit 4, ¶ 8; Exhibit 5, ¶ 8.

11. In 2011, various events of default occurred thereby making all amounts due under the Senior Note, Note No. 2, and Note No. 3 immediately due and payable. Although all amounts owed under the Senior Note, Note No. 2, and Note No. 3 are now past due, borrowers have not repaid any of the indebtedness and Kobernick and Klein have failed and refused to honor their personal guarantees.

12. All conditions precedent to filing this litigation have been performed or have occurred.

Cause of action

Breach of contract

13. Based on the foregoing, although Track Data fully performed under the Senior Note, Note No. 2, and Note No. 3, including advancing \$1,995,000, Kobernick and Klein breached their written guarantees by refusing to pay Track Data \$1,995,000.

14. As a result of defendants' breach of contract, Track Data, the owner and holder of the promissory notes and guarantees at issue in this matter, has been foreseeably and materially harmed.

Attorney's fees

15. Pursuant to TEX. CIV. PRAC. & REM. CODE §§ 38.001, *et seq.*, and the express terms of the guarantees, Kobernick and Klein are responsible for all attorney's

fees and expenses incurred through the trial and any subsequent appeals in this matter.

Exhibit 4, ¶ 8; Exhibit 5, ¶ 8.

Prayer

WHEREFORE, plaintiff Track Data Corporation respectfully requests that the Court, after trial on the merits or summary determination, enter final judgment awarding Track Data all actual damages to which it shows itself justly entitled on account of defendants' breach of contract, compounded by pre- and postjudgment interest, as well as attorney's fees through trial and any subsequent appeals, costs of Court, and expenses of experts, investigators, paralegals, court reporters and videographers.

Respectfully submitted,

/s/ Daniel W. Jackson

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